No. 626

In the Supreme Court of the United States

October Term, 1944

[redacted]

Petitioners,

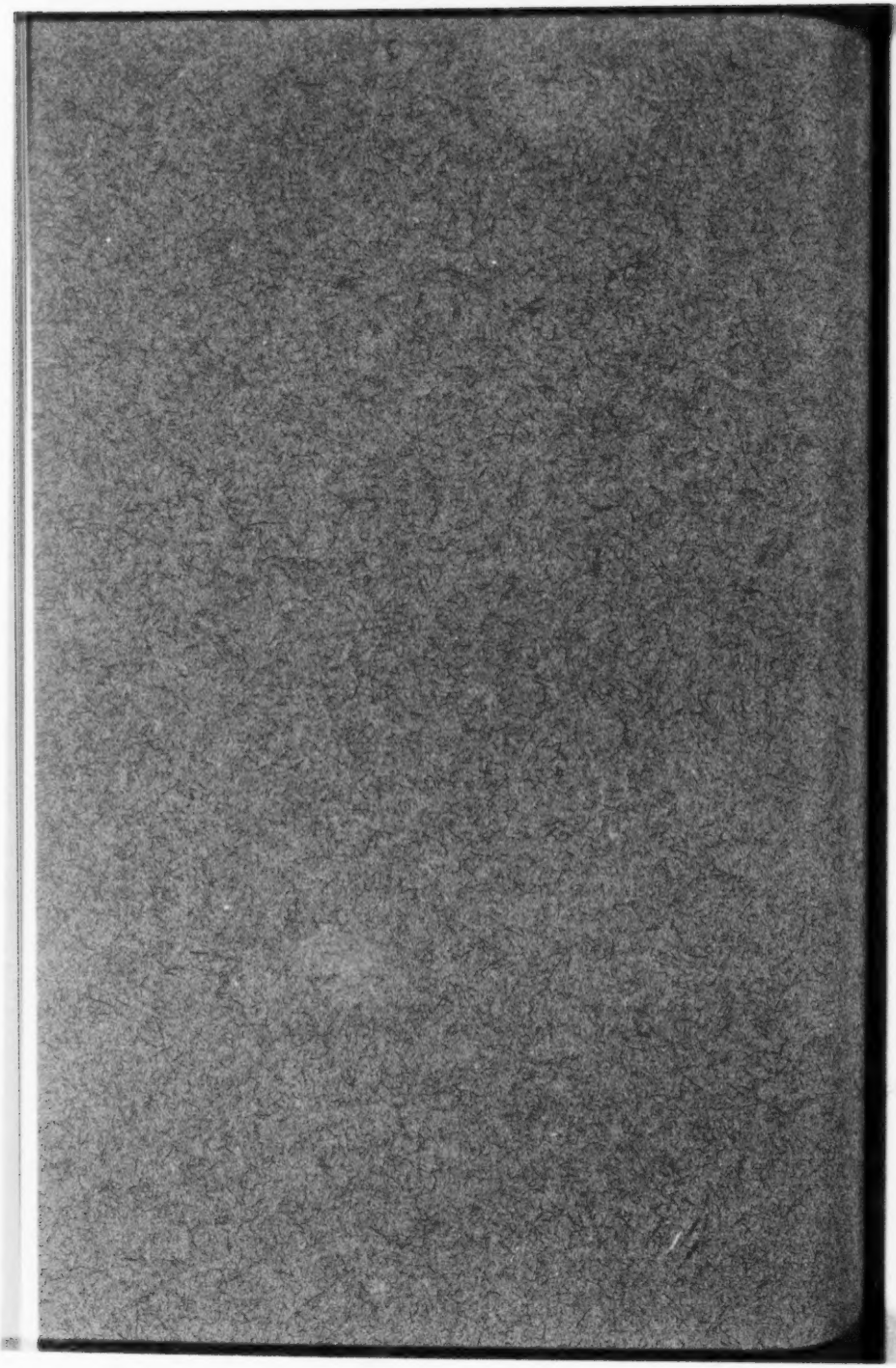
vs.

[redacted]

Respondent.

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES CIRCUIT COURT OF APPEALS FOR THE [redacted] CIRCUIT

BRIEF FOR THE RESPONDENT IN OPPOSITION



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CITATIONS

573937—44

In the Supreme Court of the United States

OCTOBER TERM, 1943

No. 623

JOSEPH J. BODELL, EXECUTOR, PETITIONER

v.

COMMISSIONER OF INTERNAL REVENUE

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES CIRCUIT COURT OF APPEALS FOR THE FIRST CIRCUIT

BRIEF FOR THE RESPONDENT IN OPPOSITION

OPINIONS BELOW

The opinion of the United States Board of Tax Appeals (R. 11–19), now the Tax Court of the United States, is reported at 47 B. T. A. 62. The opinion of the Circuit Court of Appeals (R. 70–77) is reported at 138 F. 2d 553.

JURISDICTION

The judgment of the Circuit Court of Appeals was entered November 3, 1943 (R. 77). The petition for a writ of certiorari was filed January 21, 1944. The jurisdiction of this Court is invoked under Section 240 (a) of the Judicial Code, as amended by the Act of February 13, 1925.

QUESTION PRESENTED

Were the proceeds of insurance policies taken out by the decedent on his own life, payable to his wife if living, otherwise to his estate, includible in his gross estate under Section 302 (g) and (h) of the Revenue Act of 1926, as amended? Is the issue affected by the fact that the policies were taken out prior to the enactment of the Revenue Act of 1918 where there was a reservation of the power to change the beneficiary in one and the other was an endowment policy embodying a possibility of reverter?

STATUTES AND REGULATIONS INVOLVED

Revenue Act of 1926, c. 27, 44 Stat. 9, as amended by Section 404 of the Revenue Act of 1934, c. 277, 48 Stat. 680:

> SEC. 302. The value of the gross estate of the decedent shall be determined by including the value at the time of his death of all property, real or personal, tangible or intangible, wherever situated, except real property situated outside the United States—
>
> (a) To the extent of the interest therein of the decedent at the time of his death;
>
> * * * * *
>
> (g) To the extent of the amount receivable by the executor as insurance under policies taken out by the decedent upon his own life; and to the extent of the excess over $40,000 of the amount receivable

by all other beneficiaries as insurance under policies taken out by the decedent upon his own life.

(h) Except as otherwise specifically provided therein subdivisions (b), (c), (d), (e), (f), and (g) of this section shall apply to the transfers, trusts, estates, interests, rights, powers, and relinquishment of powers, as severally enumerated and described therein, whether made, created, arising, existing, exercised, or relinquished before or after the enactment of this Act.

* * * * *

Treasury Regulations 80 (1937 ed.), as amended by T. D. 5032, 1941–1 Cum. Bull. 427:

ART. 27. *Insurance receivable by other beneficiaries.*—The amount in excess of $40,000 of the aggregate proceeds of all insurance on the decedent's life not receivable by or for the benefit of his estate must be included in his gross estate as follows:

* * * * *

(2) To the extent to which such insurance was taken out by the decedent upon his own life (see article 25) on or before January 10, 1941, and with respect to which the decedent possessed any of the legal incidents of ownership at any time after such date or, in the case of a decedent dying on or before such date, at the time of his death.

Legal incidents of ownership in the policy include, for example, the right of the insured or his estate to its economic bene-

> fits, the power to change the beneficiary, to surrender or cancel the policy, to assign it, to revoke an assignment, to pledge it for a loan, or to obtain from the insurer a loan against the surrender value of the policy, etc. The insured possesses a legal incident of ownership if his death is necessary to terminate his interest in the insurance, as, for example if the proceeds would become payable to his estate, or payable as he might direct, should the beneficiary predecease him.[1]

STATEMENT

Decedent died June 20, 1938, and was survived by his wife, Albina Elise Bodell. An estate tax return was timely filed by decedent's executor with the Collector of Internal Revenue for the District of Rhode Island (R. 12).

At the time of decedent's death there were in effect the following policies of insurance on his life[2] (R. 12):

(1) Policy No. 398704, Massachusetts Mutual Life Insurance Company, was an ordinary life policy for $10,000 taken out by decedent March 1,

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[1] The sentence last above quoted in the Regulations was restored in 1941. Article 25 of the 1934 edition of Treasury Regulations 80 had previously included a similar provision but it was eliminated in 1937 by T. D. 4729, 1937–1 Cum. Bull. 284.

[2] Other policies, involved in the Board proceeding (R. 13), are now conceded to be taxable (R. 68). The $40,000 exclusion has been allowed (R. 13).

1917. It was first made payable to decedent's mother, but on October 6, 1917, was made payable to decedent's wife, if living at the time of his death, otherwise to decedent's estate. Decedent reserved the right to change the beneficiary at any time (R. 32–34b).

(2) Policy No. 178772, Provident Mutual Life Insurance Company of Philadelphia, was an endowment policy for $5,000 taken out by decedent October 31, 1911, payable to him on October 31, 1955, if living, otherwise to his mother, if living, otherwise to his estate. Decedent's wife was irrevocably named beneficiary, instead of his mother, on May 6, 1918. (R. 27–31.)

The decedent paid all of the premiums on the above policies. The executor did not report any of the proceeds of the insurance policies in the decedent's estate tax return. (R. 13.)

The Board sustained the action of the Commissioner in including the proceeds of the policies in the gross estate (R. 19), and the Circuit Court affirmed (R. 77).

ARGUMENT

The Circuit Court properly concluded that (R. 74) the cases of *Bingham* v. *United States,* 296 U. S. 211, and *Industrial Trust Co.* v. *United States,* 296 U. S. 220, relied upon by the taxpayer (Pet. 4) were discredited by the more recent decisions of this Court in *Helvering* v. *Hallock,* 309 U. S. 106, and *United States* v. *Jacobs,* 306 U. S.

363, and that the retention of rights in the insurance policies, based upon survivorship, brought the case within the broad provisions of Section 302 (g) and (h) of the Revenue Act of 1926, *supra*.

Clearly, the proceeds of the policy in which the insured retained the right to change the beneficiary at any time must be included in the gross estate. The continued existence of the insured's power to change the beneficiaries after the enactment of the 1918 Act is a complete answer to any contention based upon retroactivity. *Broderick* v. *Keefe*, 112 F. 2d 293 (C. C. A. 1st); *Commissioner* v. *Washer*, 127 F. 2d 446 (C. C. A. 6th), certiorari denied, 317 U. S. 653; *Keefe* v. *United States*, 46 F. Supp. 1016 (C. Cls.), certiorari denied, 318 U. S. 768.

The proceeds of the remaining policy, in which the decedent retained the right to have the fund paid to him if he survived the endowment period, and if he did not, to his estate, provided the named beneficiary should predecease him, are likewise includible in his gross estate under the principles laid down in the *Hallock* and *Jacobs* decisions. In the memorandum filed with this Court in answer to the petition for certiorari in the *Washer* case[3] (No. 233, October Term, 1942)

[3] That case involved pre-1918 insurance policies in most of which some other rights were retained but we approached the problem on certiorari as though the decision were based on the possibility of reverter.

it was recognized that the decision there, as does the decision here, conflicted in principle with the *Bingham* and *Industrial Trust Co.* decisions. The view was there taken, however, that the basis for that conflict had been removed by the *Hallock* case[4] and that since it was unlikely that any lower court would now reach a contrary result, there was not such a conflict as to call for review by this Court. The denial of certiorari under the circumstances thus presented to the Court in the *Washer* case suggests that similar action should be taken here.

Since, under the ruling of the *Hallock* case, the retention of rights based on survivorship brings the case within the scope of Section 302 (g), the fact that the policy was taken out before 1918 is immaterial under the holding of the *Jacobs* case,[5] the rationale of which is equally applicable here. The court below properly concluded (R. 76) that with the constitutional doubts of the *Bingham* case thus dispelled, the construction

[4] In *Chase Nat. Bank* v. *United States*, 116 F. 2d 625 (C. C. A. 2d), the court referred to the *Hallock* decision as overruling *Helvering* v. *St. Louis Trust Co.*, 296 U. S. 39, and concluded that (p. 627) "*Bingham* v. *United States* must fall with them". See also *Bailey* v. *United States*, 31 F. Supp. 778 (C. Cls.).

[5] The dissenting opinion in the *Jacobs* case is based on the objection of retroactivity urged by the taxpayer here, and *Lewellyn* v. *Frick*, 268 U. S. 238, was there cited; but the majority applied the rule which we urge here. The situations are analogous and the decision, particularly when coupled with the decision in the *Hallock* case, sustains the action of the court below.

given to Section 302 (h) by this Court in the *Industrial Trust Co.* case was no longer controlling. The plain language of Section 302 (h) makes Section 302 (g) applicable to pre-1918 policies.

CONCLUSION

The decision below is correct. There is no such conflict as to call for a review by this Court. The petition should be denied.

Respectfully submitted.

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